

**Statement for the Record**  
**Senator Patrick Leahy**

Chairman, Subcommittee on Intellectual Property  
United States Senate Committee on the Judiciary

On “The Patent Trial and Appeal Board After 10 Years: Impact on Innovation and Small  
Businesses”

Subcommittee on Courts, Intellectual Property, and the Internet

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When I crafted and passed the Leahy-Smith America Invents Act in 2011, I recognized the newly constituted Patent Trial and Appeal Board (PTAB) under our law would be a common-sense improvement to our patent system. Given the power a patent conveys—securing exclusive rights over an invention for twenty years—it was critical to create a venue for challenging low-quality patents that should have never been issued in the first place. These low-quality patents harm competition without promoting genuine innovation.

When a low-quality patent is enforced, it can stifle competitors, delay needed consumer goods from coming to market, and dissuade other entrepreneurs from innovating in a sector. Hearing these concerns, we developed a new infrastructure under the Leahy-Smith America Invents Act for meritorious challenges to be heard while ensuring that meritless attacks on high-quality patents would not take up the time, energy, and resources of patent owners.

As then-Director of the U.S. Patent and Trademark Office (PTO), David Kappos, pointed out in 2011, the newly proposed inter partes review proceedings retooled already existing but rarely used post-grant procedures at the PTO. This legislation provided a more cost-effective and efficient alternative to the lengthy, expensive district court lawsuits and PTO proceedings that were the only existing venues to challenge low-quality patents before the Leahy-Smith America Invents Act.

In the decade since the Leahy-Smith America Invents Act, thousands of patents have been challenged in front of the PTAB. The PTAB’s expert judges have the technical and legal expertise to efficiently address patent validity, cancelling patents that should never have been granted and reinforcing high-quality patents. I’m immensely proud of the PTAB that we created in 2011. Its judges are internationally recognized experts in patent law, and more than 250 of them signed up as civil servants, determined to do their best and improve our patent system.

And some of the biggest beneficiaries of the PTAB have been small businesses and entrepreneurs. While this hearing may focus on the challenges faced by small businesses and entrepreneurs at the PTAB, it’s important to lay out what advantages the PTAB provides to the small, mom-and-pop innovators in our economy. It is small businesses that are often the targets of bulk patent assertions. Companies will send out thousands of demand letters, and only those with significant time and money to spend on patent litigation can afford to litigate those cases, rather than paying the demand-letter senders. PTAB proceedings are an order of magnitude less

expensive than litigation, allowing these small businesses to have patent validity assessed rather than simply paying off those who send demand letters. When PTAB proceedings still cost more than a single small business can pay, they work together through trade associations. And even if a PTAB proceeding is never filed, a small business presenting a clear case of invalidity in a draft PTAB petition will bring negotiations to a close faster and on more favorable terms than the small businesses could have expected before the PTAB existed.

Under the last Administration, however, the many benefits of the PTAB were undermined through arbitrary time limits for filing review petitions, outside the time limits specified by the statute. Those time limits have prevented meritorious petitions from being addressed, and have disincentivized the use of the proceedings. Not only that, but such time limits were already addressed in the statute: The Leahy-Smith America Invents Act laid out a one-year time bar for filing a PTAB proceeding. The last Administration simply didn't like Congress's time bar and decided to create a shorter one.

Critics of the PTAB will argue that serial petitioners and bad-faith actors have misused PTAB proceedings. Those concerns, while important, can be addressed through targeted legislation to make PTAB an even more effective venue. The patent system will benefit from thoughtful legislative reform building on the best parts of the PTAB process. The answer is not to abandon or unravel the PTAB proceedings, which have provided innumerable benefits to small businesses in Vermont and across the country.

That is why I'm proud to propose improvements to the PTAB process through the PTAB Reform Act of 2022, alongside Senator Cornyn and Ranking Member Tillis. This bill represents the Senate at its best—different sides coming together to achieve a thoughtful compromise that is greater than what either side could achieve alone. Through this bill's modifications, we can deliver further improvements to the patent system, reinforcing high-quality patents while protecting startups, small businesses, and American manufacturers from patents that do not represent true innovation. The PTAB Reform Act will also improve the PTAB process for small-business patent owners. Those patent owners paid to have their patents examined by the PTO, and they do not want to pay again to have their patents reviewed. The PTAB Reform Act will provide that, for a small-business patent owner who has not deliberately put her patent's validity in play through litigation, all expenses of the PTAB proceeding—including attorney and expert witness fees—will be paid by the PTO, through petition fees. This will go a long way toward relieving any burdens on America's small businesses.

The PTAB Reform Act takes the lessons learned from the last decade, gathered both from experience and extensive stakeholder input, and brings the PTAB into its next decade as an even more effective, reliable, and fair venue for patent challengers and patent owners. I am thrilled that we are discussing the PTAB and its impact on innovation and small businesses. Vermont is filled with exactly these innovators, creators, and small businesses. I look forward to moving the conversation forward so the PTAB can continue its good work for the people of Vermont and throughout the United States.